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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. ~~385~~ 48

PACIFIC STATES BOX & BASKET COMPANY,

Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

STATEMENT AS TO JURISDICTION.

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 955

PACIFIC STATES BOX & BASKET COMPANY,
A CALIFORNIA CORPORATION,

Plaintiff and Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, AND CHAS. A. COLE, AS CHIEF OF THE DIVISION OF PLANT INDUSTRY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF OREGON,

Defendants and Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THIS HONORABLE COURT:

Pacific States Box and Basket Company, the above-named appellant, herewith makes its statement in accordance with Rule 12 of the Rules of this Court, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the interlocutory order and final decree heretofore made by the statutory court of three judges con-

sisting of Honorable Francis A. Garrecht of the Circuit Court of Appeals, Honorable John H. McNary, and Honorable James Alger Fee of the United States District Court for the District of Oregon, which interlocutory order denied appellant's application for an interlocutory injunction and granted appellees' motion to dismiss appellant's amended bill of complaint; and the final decree of said court which denied Plaintiff's prayer for a permanent injunction and dismissed plaintiff's suit.

(A) Statutory Provisions.

The statutory provisions upon which appellant relies to sustain jurisdiction of the Supreme Court is Judicial Code Sec. 266 as amended (Title 28 U. S. C. A. Sec. 380) which so far as pertinent herein provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. • • • The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(B) Statutes and Orders, Validity of Which Is Involved.

Appellant challenges the validity of certain orders fixing standard containers for berries made and promulgated by Defendant Chas. A. Cole in his official capacity as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Orgeon and as approved by Max Gehlhar as Director of Agriculture for the State of Oregon, one of which orders is dated May 3, 1933, and is entitled "Standard Containers for Fruits and Vegetables" and the other order is dated June 1, 1933, and is entitled

"Oregon Standards for Strawberries (1933)" in so far as said orders or regulations relate to containers for strawberries and raspberries, which orders or regulations were made under the purported authority of Section 18-2902 and Section 18-2911 of Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, and appellant also challenges the validity of said statutes in so far as such statutes purport to sustain the above mentioned orders and make the violations thereof unlawful and punishable. There is quoted herewith that part of the above mentioned orders, the validity of which is involved:

"Standard Containers for Fruits and Vegetables.

Raspberries.

Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2 x 5¼ x 5¼ inches, outside measurements: Bottom set up ¾ inch, inside depth 1¼ inches.

Strawberries.

Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks, 2½ x 4⅜ x 4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches.

As provided by sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, the above mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of

time until January 1, 1934, in order to make use of such material.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this the third day of May, 1933. I hereby designate the Department of Agriculture Bulletin as the publication in which said Order shall be published.

CHAS. A. COLE,
Division Chief.

Approved:
MAX GEHLHAR,
Director of Agriculture."

"Oregon Standards for Strawberries

(1933)

Department of Agriculture, State of Oregon.

Division of Plant Industry.

Definition of Terms:

Package: The 24-pint hallock crate is the standard crate for strawberries. Size of crate, 6⅜ inches deep by 13¾ inches wide by 19¼ inches long, all inside measurements, with ½-inch center piece. Size of hallock shall be 2½ by 4⅜ by 4⅜ inches, outside measurements. Bottom of hallock set up ¾ inch, inside depth 1¾ inches.

The foregoing grades and standards, as amended June 1, 1933, shall become effective July 15, 1933.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this, the 1st day of June, 1933.

CHAS. A. COLE,
Division Chief.

Approved:
MAX GEHLHAR,
Director."

The following are the pertinent provisions of the statutes referred to above: Section 18-2902, Oregon Code of 1930, provides as follows:

> "In order to promote, protect, further and develop the horticultural interests of this state, the board is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to change any of them from time to time."

(The Board referred to in said Section was the Oregon State Board of Horticulture.)

That Section 18-2911, Oregon Laws of 1930, provides among other things as follows:

> "Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a container, any such horticultural product to which the standard is applicable, unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act. • • • Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or be imprisoned not more than one year or both."

Chapter 136, Oregon Laws of 1931, provided for the creation of a State Department of Agriculture, for the appointment of a Director of Agriculture; that the State Department of Agriculture should take over the duties and functions of the State Board of Horticulture and enforce the statutes involved in this case. The validity of this statute is not directly involved in this suit.

That Chapter 225, Oregon Laws of 1933, provides as follows:

> "Section 3. It shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the State of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the state of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed, and each container or package stamped, marked or labeled in conformity with such grades and regulations, except that such transportation be from the fields where grown to the packing house, canneries or by-product plants. It also shall be unlawful to prepare, deliver for shipment, ship, transport, offer for sale or sell a deceptive pack, or package, load, arrangement or display of fruits, vegetables and/or other horticultural products."

> "Section 8. Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than the sum of $20 nor more than $500 or by imprisonment in the county jail for a period not to exceed 60 days, or by both such fine and imprisonment."

(C) Dates.

The date of the order denying Plaintiff's application for an interlocutory injunction, and granting Defendants' motion to dismiss Plaintiff's amended bill of complaint, and which is sought to be reviewed, is December 21, 1934. The date of the final decree denying Plaintiff's prayer for a permanent injunction and dismissing the above entitled suit is February 27, 1935. The date upon which the application for appeal is presented is March 18, 1935.

Nature of Case.

This is a suit to enjoin the Defendants and appellees from enforcing the above described orders of the Department of Agriculture of the State of Oregon fixing standard containers for strawberries and raspberries, which orders were made pursuant to Section 18-2902 and Section 18-2911, Oregon Laws of 1930, and Sections 3 and 8 of Chapter 225, Oregon Laws of 1933, and Plaintiff seeks to enjoin the enforcement of said statutes in so far as they relate to strawberry and raspberry containers. The amended bill of complaint alleges that plaintiff and appellant is a California corporation and has been engaged in the business of manufacturing in the State of California containers for strawberries and raspberries, made of two thin strips of wood crossing each other to form the bottom and bent upwards to form the sides, reinforced with a narrow metal strip to protect the baskets and the contents and to insure uniformity of cubic measure. The baskets so constructed have openings to insure ventilation, and the cubic content is one pint. These baskets are known as tip-top berry baskets or cups. Plaintiff and appellant has sold such baskets in large quantities to dealers in Oregon for more than nine years and they are in common use in the United States. Appellant's case is based on the proposition that the Department of Agriculture of the State of Oregon, functioning through the Defendants, has adopted arbitrary, unreasonable and capricious standards for strawberry and raspberry containers in that the orders specify a single type of container of specific detailed dimensions (but not because the orders prescribe a certain capacity), made in a particular way, which because of the method of construction can only be made of a particular kind of wood which is not grown commercially except in the Northwest. Such orders outlaw

all other types of containers which were in general use, including the tin-top type manufactured by appellant. Appellant claims that the orders in question in so far as they relate to strawberry and raspberry cups are not reasonably necessary for the accomplishment of any legitimate purpose of the police power.

The statutes of the State of Oregon above referred to provide that when standard containers have been adopted, the sale of berries in the State of Oregon or the shipment for sale into the State of Oregon in other than the containers designated as standard, shall be illegal and those guilty of shipment or sale of berries in other than the standard containers shall be subject to fine or imprisonment. The Defendants, as officials of the State of Oregon, have taken steps to enforce said orders. The direct effect of the orders is to prevent dealers and producers from purchasing the type of berry container made by appellant and others, and to destroy appellant's business to that extent, thus depriving it of its property without due process of law.

Appellant challenges the constitutionality of the orders in question and the above statutes as noted, on the following grounds:

1. They deprive appellant of its property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution.

2. They deny to appellant the equal protection of the laws in violation of Section 1 of the 14th Amendment of the Constitution. The orders grant a monopoly to manufacturers of the so-called hallocks, and prevent the appellant and all others who manufacture and sell different types of berry cups from selling their products to producers and dealers in Oregon or who desire to ship berries into Oregon. The orders are unreasonably discriminatory in favor of the

so-called hallock and against all other types of cups, including those made by appellant.

3. The orders are void for the reason that they interfere with and impose unlawful burdens on interstate commerce and the business of appellant, contrary to and in violation of sub-division 3 of Section 8 of Article 1 of the Constitution.

Plaintiff and appellant, in both its bill and amended bill of complaint, asked for an interlocutory injunction as well as a permanent injunction restraining the enforcement and operation of the orders in question and of the statutes in so far as they purport to justify said orders. A restraining order was granted, and was in effect until the order was made denying the interlocutory injunction and dismissing Plaintiff's amended bill of complaint.

Citation of Cases Believed to Sustain the Jurisdiction.

The following is citation of the cases believed to sustain the jurisdiction of this Court on appeal:

Borden's Farm Products Company, Inc., v. *Charles H. Baldwin*, 79 L. Ed. (Adv. Opinions), 130; decided December 3, 1934, 55 S. Ct. 187.

Herkness v. *Irion*, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198.

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659.

Clark v. *Poor*, 274 U. S. 555, at 556, 47 S. Ct. 702, 71 L. Ed. 1199, at 1200.

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551.

Abuse of Discretion.

Appellant respectfully contends that the statutory three-judge court abused its discretion in denying its application for an interlocutory injunction because:

(a) The Court overlooked the fact that there was no denial of any of the allegations of the amended bill of complaint, or of the affidavits filed on behalf of Plaintiff, and the Court could not have considered all of the allegations of the amended bill and have reached the conclusion that the appellant was not entitled to an interlocutory injunction.

(b) The opinion of the Court shows that it assumed certain facts which were not in the record, and assumed certain facts to be matters of general knowledge, where there was no justification for such assumption. The following paragraph of the typewritten opinion illustrates this point:

> "It is a matter of general knowledge that enforced standardization of containers is essential to the economic handling, shipping and selling of horticultural products, for, among other reasons, it prevents fraud and deception in sales, provides the best method of stowage, and eliminates many sizes that complicate the problems of transportation."

(c) The Court relied too strongly on the proposition that since the legislature authorized a standard container law, all acts or orders passed thereunder are free from constitutional attack.

See particularly, *Borden's Farm Products Co.* v. *Baldwin*, 79 L. Ed. 130 (Advance Opinions), 55 S. Ct. 187.

For and by reason of the foregoing, it is respectfully submitted that this Honorable Court has jurisdiction of this appeal, by virtue of the provisions of Judicial Code Section 266 as amended.

Respectfully submitted,

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Solicitors for Appellant.

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